OFFICE OF LEGISLATIVE LEGAL SERVICES
COLORADO GENERAL ASSEMBLY

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045
FACSIMILE: 303-866-4157
E-MAIL: olls.ga@state.co.us

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

May 1, 2009

The Committee on Legal Services met on Friday, May 1, 2009, at 8:49 a.m. in HCR 0112. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Schwartz
Representative B. Gardner (present at 8:51 a.m.)
Representative Kagan (present at 8:53 a.m.)
Representative Labuda, Vice-Chair
Representative Levy
Representative Roberts

Representative Labuda called the meeting to order. She said the purpose for meeting today is that Senator Veiga resigned as Chair of this Committee. Mr. Pike also offered to give the Committee a brief update on the public records and e-mail policy.

8:50 a.m.
Senator Schwartz nominated Senator Morse to serve as Chair of the Committee. Representative Levy seconded the nomination. No objections were raised to that motion and it passed unanimously.

8:51 a.m. -- Charley Pike, Director, Office of Legislative Legal Services, addressed the Committee. He said I wanted to report back to the Committee on what has transpired with respect to the policy the Committee recommended to the Executive Committee. The Executive Committee considered the policy at a meeting about a week ago and they took it off the table after they had some discussion about it. One member in particular was concerned about the

e-mail retention aspect of the policy and objected to members appearing to have to follow the e-mail policy as set out, even though it was fairly discretionary the way you all had recommended it. In light of that, we made a change to the policy at the direction of others in the Executive Committee along with that member to try to get at the issue he raised. If you turn to page 11 of the policy, the change on the e-mail retention policy would make it clear that the different categories are specifically for legislative staff as a suggestion. Then, if you go down to paragraph 2., what the Executive Committee wanted to consider is that each member will be able to either utilize those criteria or establish each of their own criteria as long as it's in writing. That's what will be considered by the Executive Committee and it's my understanding they're going to meet Monday to consider this again.

Mr. Pike said the other thing that came up was Senator Shaffer asked us to get together with representatives of the Colorado Press Association. Dan Cartin and I went through the policy with attorneys for the Colorado Press Association and Greg Romberg. They made a number of suggestions that we thought we could try to accommodate in some fashion. Those are also contained in the policy. Very briefly, on page 3, we added a new paragraph 2.e. that simply reiterates some of the things that are not included in work product and that was because the press association thought the emphasis in the policy could lead some custodians to believe that there aren't these other things out there that should be readily made available. That didn't seem to be a problem; it is simply a restatement of the statute. Further down in paragraph 4., the press association was a little concerned about e-mail metadata and what that was. For example, they were concerned that a date that is entered on your e-mail is technically e-mail metadata and they felt that should be made available, so we accommodated them in that regard and made that statement clear. Next, they were concerned, in paragraph 1. on page 3, that by indicating that requests have to be in writing, there are some folks who would interpret any request that's made of an agency as an open records request. For example, if someone simply walks in and says I'd like to have a copy of House Bill such-and-such, the press association is saying, technically, that's an open records request even though we wouldn't think of that as an open records request unless they formally invoke the open records law when they make that request. We added a sentence that simply indicates that someone can respond to an oral request if it's something that's readily available, to simply accommodate that kind of a situation. Next on page 4, the press association was concerned that the way we had structured paragraphs 2. and 3. gave an inference that every open records request would take three days for a response. Of course, that's not what the implication was. The idea is to meld paragraph 3. with paragraph 2. and make it clear, therefore, that paragraph 1. really gets

to the open records request that's readily available and that you give right away, and only if it's not immediately or readily available do you get into the three-day period and/or the seven-day period depending on whether or not there are special circumstances. On the next page, we added paragraph 7. to address a question the press association raised about paragraph 6.c. They were concerned about the policy, even though it's expressed as a general practice, in that you wouldn't ordinarily forward something electronically as a response to an open records request. They gave the example of a reporter in Pueblo who might want to obtain something from us through an open records request and he'd like to have it immediately rather than sent to him by mail and/or require that he come up to inspect it. Our suggestion was we weren't inclined to change the general thrust of what's in paragraph 6., but we can certainly indicate that if it's something that is clearly an open record and doesn't have to be examined, i.e., it's been previously released, and is already prepared in .pdf format or can be done so with minimal effort, the custodian could elect to go ahead and send that. The next change starts at the bottom of page 5 in paragraph 10. We had synopsized the general thrust of the open records law that indicates that the custodian shall deny inspection if it's contrary to federal law or regulation, if it would violate a court order, or if it would cause substantial injury to the public interest. The press association's concern with the last one is more if it's a special circumstance that's invoked under specified circumstances, and by listing it with the others, a custodian could leap to the conclusion that they could go right to the substantial injury and deny access. So, we set it out as a separate item and then added the last sentence that the custodians would be encouraged to consult with us prior to denying any inspection. The press association wanted that simply because they indicated that they'd be more comfortable if somebody was looking over the shoulder of the custodian when they're denying access to a public record. The next change is a new paragraph 2.c. on page 6. The press association's take on the *Black v. S.W. Water Conserv. Dist.* case that authorizes an assessment of costs is to suggest that the minimal criteria would not allow the custodian to average out the costs of people who are actually responding to the request. For example, if you came up with a $50 an hour average, they're saying that case does not stand for the fact that you could assess that entire charge, that you still have to figure out some way to make it a minimal charge. They suggested charging no more than $30 an hour. We were a bit reluctant when they first suggested that simply because there wasn't anything in the statute that authorizes that, but we figured in light of this Committee's concern about the minimal charges and making sure that it was nominal, it wouldn't hurt to go ahead and do that. What's the harm of putting in a cap in terms of what the charge could be? That's in there as a recommendation. The last thing is paragraph 6. on page 7. The press association wanted us to take out the daily backup tape as not being

a public record that would be available to get someone's e-mail. We disagreed with them totally on that. What we did there was clarify the language to basically add additional support to our position. My example is if you have written correspondence and you throw it in the waste basket and the janitor picks up that material, they can't do an open records request of the janitor to get your correspondence. You deleted it, so when you delete an e-mail, they can't go to the custodian of the backup tape and try to get your e-mail. We'll defend you to the end on that one. Those are the only changes that will be included in the document that the Executive Committee considers on Monday.

Representative Labuda said on page 6, paragraph 2.c., where you're listing the dollar amount, is that going to be going beyond the scope of the authority given in the statute? Mr. Pike said the statute doesn't address the costs at all. Basically, we're relying on the *Black* case and it's the press association's interpretation that that's what the case provides. On the whole, we kind of figured that would work.

Representative Levy said on page 6 on the special circumstances provision, my understanding is that if release would cause substantial injury to the public interest, it's "shall" deny and you have "should" deny. I'm concerned that could result in a situation where release actually would cause substantial injury but we have the custodian in a situation of saying it says I should, but I don't think I will, deny. Mr. Pike said thank you, that's a good point. We'll change that before we take it to the Executive Committee.

9:03 a.m.

The Committee adjourned.